No. 46102-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

OLYMPIC TUG & BARGE, INC.,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
Honorable Gary R. Tabor

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Olympic Tug and Barge, Inc. operates a tugboat business. This business includes the service of loading fuel into ships engaged in the movement of cargo in waterborne interstate or foreign commerce. This service is sometimes referred to as "bunkering."

Under ordinary circumstances, tugboat businesses pay the public utility tax on their gross revenues. In 1979 the Legislature created a special business and occupation (B&O) tax classification for "stevedoring and *associated activities* pertinent to the movement of goods and commodities in waterborne interstate or foreign commerce" (RCW 82.04.260(7) (emphasis added)).[1] A person taxable under the "stevedoring and associated activities" B&O tax is not subject to the public utility tax with respect to that portion of the business upon which the B&O tax applies. This provision was designed to assure that taxpayers whose business activities fall within both the public utility tax and the B&O tax statutes are not double-taxed on their revenues.

The question before the Court in this case is whether the public utility tax or the B&O tax applies to the revenues Olympic derives from its "bunkering" services. RCW 82.04.260(7) is clear: revenues from *both* "stevedoring" *and* "associated activities" are subject to the B&O tax. Olympic's bunkering business admittedly is not "stevedoring," because it

[1] As enacted, the stevedoring and associated activities classification was codified as subsection 13 of RCW 82.04.260. *See* Laws of 1979, 1st ex. sess. ch. 196 § 2.

does not involve the loading and unloading of goods and commodities (cargo) from ships. But Olympic's loading of fuel into the bunkers of cargo ships plainly is an "*associated* activity *pertinent* to the movement of goods and commodities in waterborne interstate or foreign commerce" (RCW 82.04.260(7) (emphasis added)), because if that fuel is not loaded into those ship bunkers, the cargo loaded by the stevedores is not going to "move..." anywhere.

The statute goes on to list "specific activities" that are deemed "associated activities" taxable under the "stevedoring and associated activities" B&O tax. This list includes "incidental vessel services" and the statute sets forth two illustrative examples of such services. These examples are preceded by the language "including but not limited to," meaning there are other services which have not been specifically listed but to which the tax should apply. The two examples, moreover, have something in common with bunkering -- they all get the ship ready for its journey. Loading fuel into a vessel, which allows it to move goods and commodities in waterborne interstate or foreign commerce, thus not only is an "associated activity" "pertinent" to the movement of the cargo: it also is an "incidental vessel service" within the plain language of the statute.

To prevail, the Department of Revenue needs this Court to rule that the "stevedoring and associated activities" B&O tax applies only to businesses that load, unload, or transport cargo to and from vessels. But to get to that point, the Department also needs this Court to ignore the "pertinent to the movement . . ." and "incidental vessel services"

provisions of RCW 82.04.260(7). The Department also claims that Olympic's reading of the statute is overbroad and leads to absurd results, when in fact it is the Department's reading that ignores the common-sense reality of preparing a cargo vessel for a voyage in interstate or foreign commerce.

II. ARGUMENT ON REPLY

A. This is A Tax Incidence Case, *Not* A Tax Deduction or Exemption Case.

The public utility tax on a "tugboat business" (RCW 82.16.010(10)) is imposed by RCW 82.16.020(1)(f) and (2). The B&O tax on "stevedoring and associated activities" is imposed by RCW 82.04.260(7). There is no question that BOTH of these statutes ***impose*** a tax. The question in this case is whether the B&O tax applies to Olympic's bunkering services instead of the public utility tax.

The rules of statutory construction provide that, in cases involving whether a tax applies at all, "if there is any doubt as to the meaning of a tax statute, it must be construed against the taxing power." *Mac Amusement Co. v. Dep't of Revenue*, 95 Wn.2d 963, 966, 633 P.2d 68 (1981) (citing *Foremost Dairies, Inc. v. State Tax Comm'n*, 75 Wn.2d 758, 453 P.2d 870 (1969); *Buffelen Lumber & Mfg. Co. v. State*, 32 Wn.2d 40, 43, 200 P.2d 509 (1948)). Accordingly, if the Court has any doubt about whether the B&O tax applies to Olympic instead of the public utility tax, the issue must be resolved against the Department and in favor of Olympic.

The Department argues that RCW 82.04.260(7) "creates an *exemption* from the public utility tax in favor of the lower stevedoring [tax] rate" and therefore urges this Court to apply the rule of construction for exemption and deduction statutes, under which "the statute 'must be narrowly construed.'" Dep't Brief at 12 (quoting *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 455, 210 P.3d 297 (2009) (emphasis added)). But the language in question -- "Persons subject to taxation under this subsection are exempt from payment of taxes imposed by chapter 82.16 RCW [public utility tax] for that portion of their business subject to taxation under this subsection" (RCW 82.04.260(7), second sentence) -- does ***not*** create an ***exemption*** from tax, even though it does use the word "exempt." Instead, this provision ***prevents double taxation*** of businesses like Olympic. The B&O tax was intended to be ***in lieu of*** the public utility tax that might otherwise apply to the business, not in addition to, and by including the "Persons subject to taxation" statement in RCW 82.04.260(7) the Legislature assured taxpayers qualifying for the "stevedoring and associated activities" B&O tax that they would not also be taxed under the public utility tax.

Later in its brief the Department actually acknowledges that this language was included in the statute "[t]o avoid a double tax on the income of these businesses." *See* Dep't Brief at 24. This admission should be fatal to the Department's earlier attempt to get the benefit of the rule of construction for exemption and deduction statutes. The issue here is which of two tax-imposing statutes applies to Olympic, and the rule is

clear -- in a case involving whether a taxing statute applies, it is the taxpayer that gets the benefit of the doubt.

B. Let's Dissect the Statute – Again.

RCW 82.04.260(7) contains four sentences. Olympic has reproduced them in the Appendix to this brief. Each will be discussed in the order in which they appear in the statute.

1. The First Sentence.

The first sentence of RCW 82.04.260(7) introduces the tax, imposes the tax on certain persons, gives the tax a name, and sets the rate. The tax is imposed "[u]pon every person engaging within this state in the business of stevedoring and associated activities." This first phrase clearly imposes the tax. The sentence then goes on to set forth the full name of the tax: "stevedoring and associated activities pertinent to the movement of goods and commodities in waterborne interstate or foreign commerce." Hence, the words "stevedoring" and "associated activities" are two distinct categories of business activities and the phrase "pertinent to the movement of goods and commodities in waterborne interstate or foreign commerce" can logically be read as applying only to the phrase "associated activities."[2]

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[2] Sentence 1 of RCW 82.04.260(7) has two halves separated by a semicolon (;). The second part of the sentence states that "as to such persons the amount of tax with respect to such business is equal to the gross proceeds derived from such activities multiplied by the rate of 0.275 percent." This last clause of sentence 1 sets the measure and rate of the "stevedoring and associated activities" B&O tax and requires no further explanation or discussion.

In analyzing the phrase "stevedoring and associated activities," the meaning of "stevedoring" should be undisputed. Stevedoring has long been recognized as "'the business of loading and unloading [cargo from ships] . . . to and from the first place of rest,' which means that it cover[s] the space between the hold of the vessel and a convenient point of discharge upon the dock[.]'" *Department of Revenue v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 737, n.3, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978) (quoting *Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90, 93, 585 S. Ct. 72, 82 L. Ed 68 (1937)). As for the phrase "associated activities," its meaning is to be "discerned from the ordinary meaning of the language of the statute at issue as well as the context of the statute in which that provision is found[.]" *Washington Federal Savings & Loan Ass'n v. McNaughton*, 181 Wn. App. 281, 291, 325 P.3d 383 (2014) (citing *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010)). The phrase "pertinent to the movement of goods and commodities in waterborne interstate or foreign commerce" that immediately follows the term "associated activities" is an obvious attempt to identify the kinds of activities associated with stevedoring that the tax is intended to cover.[3]

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[3] If the Court has any doubt that the phrase "pertinent to the movement . . ." modifies "associated activities" and not "stevedoring," it should follow the rule that "a doubtful term or phrase in a statute . . . takes its meaning from associated words and phrases." *Burns v. City of Seattle*, 161 Wn.2d 129, 148, 164 P.3d 475 (2007) (citing *State v. Rice*, 120 Wn.2d 549, 560-61, 844 P.2d 416 (1993); *City of Mercer Island v. Kaltenbach*, 60 Wn.2d 105, 109, 371 P.2d 1009 (1962) (citing *Winkenwerder v. City of Yakima*, 52 Wn.2d 617, 632, 328 P.2d 873 (1958)); 2A Norman J. Singer, STATUTES & STATUTORY CONSTRUCTION § 47.16 (6th ed. 2000)). "When two or more words are grouped together

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"[E]ach word of a statute is to be accorded meaning." *State ex rel. Schillberg v. Barnett*, 79 Wn.2d 578, 584, 488 P.2d 255 (1971). "Whenever possible, statutes are to be construed so ' "no clause, sentence or word shall be superfluous, void or insignificant." ' " *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009) (citing *Kaspar v. City of Edmonds*, 69 Wn.2d 799, 804, 420 P.2d 346 (1966) (quoting *Groves v. Meyers*, 35 Wn.2d 403, 407, 213 P.2d 483 (1950))). "A court 'is required to assume the Legislature meant exactly what it said and apply the statute as written.'" *HomeStreet*, *supra* (quoting *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997)).

The word "pertinent" is not defined in RCW 82.04.260(7). To determine the common or ordinary meaning of a word, courts look to the dictionary. *Garrison v. Wash. State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). "Pertinent" means "having some connection with the matter at hand; relevant; to the point." WEBSTER'S NEW WORLD DICTIONARY (3d Coll. Ed. 1994) 1009. Loading a ship with fuel oil clearly has "some connection with the matter at hand," which the statute expressly identifies as "the movement of goods and commodities in waterborne interstate or foreign commerce[.]" No vessel can "move...goods" "in interstate or foreign commerce" without fuel, and it is

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and have a similar but not equally comprehensive meaning, the general word is limited and restricted by the special word." *Burns*, *supra* (citing 2A Singer, *supra*). Here, the general words "associated activities" are restricted by the phrase that follows – "pertinent to the movement of goods and commodities in waterborne interstate or foreign commerce" – and therefore the latter phrase must go along with the immediately preceding phrase, "associated activities."

Olympic's bunkering services which provide that fuel. And that makes Olympic's services as "connected with the matter at hand" as the services of the stevedores who load the cargo into the ship, without which those "goods" would never begin to "move" "in interstate or foreign commerce." The common and ordinary meaning of the word "pertinent" thus supports Olympic's entitlement to be taxed under the "stevedoring and associated activities" B&O tax classification. *See* Olympic's Opening Brief at 20-21.

The Department contends that the "associated activities" language is limited only to "'activities of a labor, service or transportation nature whereby cargo may be loaded or unloaded to or from vessels or barges, passing over, onto or under a wharf, pier, or similar structure." Dep't Brief at 15 (quoting RCW 82.04.260(7)). The Department's reading, however, would effectively collapse "associated activities" back into "stevedoring," depriving the phrase of any independent meaning, which violates the well-established rule against rendering statutory language surplusage.[4]

The Department's reading also ignores that the Legislature's inclusion of "associated activities" in RCW 82.04.260(7) was obviously intended to ***broaden*** the scope of business activities subject to this B&O tax classification beyond the activity of stevedoring. The language

[4] "Whenever possible, statutes are to be construed so ' "no clause, sentence or word shall be superfluous, void, or insignificant.' " *HomeStreet,* 166 Wn.2d at 452 (citing *Kasper v. City of Edmonds*, 69 Wn.2d 799, 804, 420 P.2d 346 (1966) (quoting *Groves v. Meyers*, 35 Wn.2d 403, 407, 213 P.2d 483 (1950))).

"pertinent to the movement of goods and commodities" was intended to identify the *kinds* of "associated activities" intended to be included within this tax classification along with stevedoring. And bunkering services that provide the fuel *necessary* to the movement of goods in waterborne interstate or foreign commerce are, quite plainly, *precisely* that kind of activity.

2. The Second Sentence.

The second sentence of RCW 82.04.260(7) is discussed above. *See* Section II.A., *supra*. As argued, this sentence was placed into the statute by the Legislature to prevent taxpayers from being taxed twice on the same revenues. No further discussion on this sentence is necessary.

3. The Third Sentence.

The third sentence of RCW 82.04.260(7) is the first part of the statute's definitional section. This sentence begins the clarification of what is covered under the tax classification "[s]tevedoring and associated activities pertinent to the conduct of goods and commodities in waterborne interstate or foreign commerce[.]"[5] The sentence states that "stevedoring

[5] The first sentence in RCW 82.04.260(7), imposing and setting the rate and measure of tax, describes this special B&O tax classification as "stevedoring and associated activities pertinent to the *movement* of goods and commodities in waterborne interstate or foreign commerce" (emphasis added). The third sentence of the statute, which provides the first part of the definition, uses a nearly identical phrase – "stevedoring and associated activities pertinent to the *conduct* of goods and commodities in waterborne interstate or foreign commerce" (emphasis added). In effect, the two phrases are identical *except* the word "movement" appears in the first sentence and "conduct" in the third. Neither of these terms is defined in the statute and, absent ambiguity or a statutory definition, courts give words in a statute their common and ordinary meaning, and to determine the common and ordinary meaning of an undefined term, courts look to the dictionary. *Garrison v. Wash. State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). The definition of the word "movement" includes "the act or process of moving." WEBSTER'S

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and associated activities pertinent to the conduct of goods and commodities in waterborne interstate or foreign commerce" includes "all activities of a labor, service or transportation nature whereby:"

- cargo may be loaded or unloaded to or from vessels or barges, passing over, onto or under a wharf, pier, or similar structure; [or]
- cargo may be moved to a warehouse or similar holding or storage yard or area to await further movement in import or export or may move to a consolidation freight station and be stuffed, unstuffed, containerized, separated or otherwise segregated or aggregated for delivery or loaded on any mode of transportation for delivery to its consignee.

Thus, "stevedoring and associated activities pertinent to the conduct of goods and commodities in waterborne interstate or foreign commerce" includes the movement of cargo on and off the ship and also the movement of the cargo off and away from the dock "to await further movement in import or export" commerce.

The primary focus of this definitional clause is cargo, and had the statute ended after this sentence Olympic would not be claiming that its bunkering services fall under the "stevedoring and associated activities" B&O tax classification. But the statute does not end after this sentence. it continues into a fourth and final sentence. And, it is this final part of the statute that confirms Olympic's entitlement to be taxed under the "stevedoring and associated activities" B&O tax classification.

NEW WORLD DICTIONARY (3d Coll. Ed. 1994) 889. The definition of the word "conduct" includes "to be able to transmit or carry; convey." *Id.* at 290. The use of the term "conduct" in this third, definitional sentence of RCW 82.04.260(7) confirms that a broad reading should be given to the phrase "stevedoring and associated activities."

4. The Fourth Sentence.

RCW 82.04.260(7) concludes with a list of "specific activities included" within the "stevedoring and associated activities pertinent to the movement" definition. Those "specific activities" are:

- Wharfage, handling, loading, unloading, moving of cargo to a convenient place of delivery to the consignee or a convenient place for further movement to export mode;
- documentation services in connection with the receipt, delivery, checking, care, custody and control of cargo required in the transfer of cargo;
- imported automobile handling prior to delivery to consignee;
- terminal stevedoring and ***incidental vessel services, including but not limited to plugging and unplugging refrigerator service to containers, trailers, and other refrigerated cargo receptacles, and securing ship hatch covers***. (Emphasis added.)

This fourth sentence is the second part of the statute's definitional section. It completes the clarification of what is included within "stevedoring and associated activities pertinent to the movement of goods and activities in waterborne interstate or foreign commerce[.]" The "specific activities" include the already familiar loading and unloading of cargo to and from the ship, and the movement of the cargo from the dock to locations where the import or export of the cargo can continue. The list of "specific activities" goes on to include "documentation services in connection with the . . . cargo" and "imported automobile handling prior to delivery to consignee."[6]

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[6] The fact that "documentation services" are included within the "stevedoring and associated activities" B&O tax is revealing. The Department wants this B&O tax classification to be limited to activities at or near the dock where the ship is being loaded

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The key part of RCW 82.04.260(7) for purposes of this appeal comes in the very last clause. If the statute had ended prior to the phrase beginning with "terminal stevedoring and incidental vessel services," Olympic would not be before the Court today. But, the statute does not end at this point; instead it continues and the Court must give meaning to this final clause. *State ex rel. Schillberg*, 79 Wn.2d at 584.

"Terminal stevedoring" is not defined in the statute. A definition could not be found in a common dictionary, case law or a glossary of maritime terms. One technical source was located, however, which distinguishes between "conventional stevedoring" and "terminal stevedoring" as follows:

> **Conventional stevedoring** involves the loading and unloading of vessels and the storage of cargoes. They operate from common user facilities owned by the port authority and provide labour and equipment to load and unload vessels.
>
> **Terminal stevedoring** for *containers* incorporates the conventional role but also includes the management of rail and road interfaces – ship to shore, shore to stack and from stack to land transport.
>
> Terminal stevedoring is highly capital intensive requiring specialized berths, *portainer cranes* and specialised ramps.

State Government, Victoria, Australia, The Transport, Distribution and Logistics Sectors in Victoria, August Report 126 (July 7, 2001)

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or unloaded. But in today's electronic world, documentation services can occur almost anywhere, including in another city, state or even a foreign country. This indisputable fact disabuses the notion that "stevedoring and associated activities" is limited to business conducted at the dock. The handling of automobiles prior to delivery to a consignee is an activity that would likely also take place away from the dock where the stevedoring occurs.

(http://supplychainvictoria.org.au/resources/2001%20TDL%20Strategic%0Audit.pdf) (italic emphasis added).

Thus, terminal stevedoring describes activities using cranes and containers. This Court can take judicial notice of the fact that terminal stevedoring is the primary type of stevedoring that exists at many, if not all, of the ports in Washington State today.[7] To the extent RCW 82.04.260(7) could be read as not including terminal stevedoring, the Legislature included this term in the statute to make sure this activity is covered under the special B&O tax for "stevedoring and associated activities," since it is a major part of the activities conducted at the ports in Washington.

This leaves the language of the very last clause of the statute -- "incidental vessel services, including but not limited to plugging and unplugging refrigerator service to containers, trailers, and other refrigerated cargo receptacles, and securing ship hatch covers." There are several points to be made about this clause:

First, the focus of the statute up to this point is the loading of cargo on and off the ship, along with the nearby movement of the cargo in import and export commerce. But then, at the very end of RCW 82.04.260(7), the statute expands the scope of taxpayers entitled to the "stevedoring and associated activities" B&O tax classification. Not only do persons loading, unloading and moving cargo on, off, to and from the

[7] One has to look no further than the Port of Seattle or Port of Tacoma to see the many container ships tied up to the docks and the numerous cranes overhead.

dock pay this B&O tax, but persons performing "incidental vessel services" also pay the tax. The shift in the very last clause of the statute from cargo to vessel services is significant, because it confirms the Legislature's intention to apply this special B&O tax rate beyond the handling of cargo.

At the time the statute was enacted, the stevedores in Washington had just gone, as a result of a decision of the United States Supreme Court, from being exempt from B&O tax to being subject to B&O tax at the "service" tax rate of one (1) percent. *See Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 750, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978). The Legislature stepped in and reduced the stevedores' B&O tax rate from one percent to 0.275 percent. But the Legislature did not stop with the stevedores; instead, the Legislature went further and also lowered the tax rate to 0.275 percent for business activities "associated" with stevedoring, including "incidental vessel services." And the Legislature declared that businesses now subject to this new classification, which had previously been subject to the public utility tax, would no longer be subject to that tax (and its often higher tax rates).[8]

Waterborne interstate and foreign commerce has long been a competitive business. Shippers have all sorts of options along the West Coast of the United States (as well as in Canada and Mexico) to load and

[8] At the time RCW 82.04.260(7) was enacted, persons taxable under the public utility tax paid rates that varied from .6 percent to 3.6 percent; the public utility tax on tugboat businesses was 1.8%. Former RCW 82.16.020(5) (Laws of 1971 ex.sess. ch. 299 § 12).

unload their vessels, and it has long been recognized that shippers will go to those ports where, other factors being equal, their costs will be lowest. By reducing the tax burden on those businesses in Washington performing "stevedoring and associated activities" including "incidental vessel services," the Legislature obviously expected that the ensuing tax savings would be passed on at least in part to the shippers, which would in turn attract more shippers to Washington ports to off-load and load their vessels. The Legislature therefore targeted ***all*** persons servicing the vessel from the time it arrives, while cargo is being loaded and unloaded, and while the vessel is being readied for departure, and decided that ***all*** of these businesses would receive a lower tax rate. The Legislature recognized that if more ships came to ports in Washington it would mean more commerce for this state, more local jobs, and (ultimately) more tax dollars flowing to state and local governments.

In light of these objectives, how does it make sense to exclude Olympic's business, which is intricately connected to the servicing of the vessel while it is in port, from the benefit of the lower tax rate? The plain meaning rule of statutory construction "requires courts to consider legislative purposes or policies appearing on the face of the statute as part of the statute's context" and "background facts of which judicial notice can be taken are properly considered as part of the statute's context because presumably the legislature also was familiar with them when it passed the statute." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.,* 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (citing 2A Norman J. Singer, STATUTES AND

STATUTORY CONSTRUCTION § 48A:16, at 809-10 (6th ed. 2000) (quoting R. Randall Kelso & C. Kevin Kelso, *Appeals in Federal Courts by Prosecuting Entities Other than the United States: The Plain Meaning Rule Revisited,* 33 HASTINGS L.J. 187 (1981) (footnotes omitted)). The Department's reading of the statute requires this Court to disregard the background facts of the economic and policy considerations that obviously underlay the Legislature's decision to establish the stevedoring and associated activities B&O tax classification.[9] "Statutes should be interpreted to further, not frustrate, their intended purpose." *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 99, 864 P.2d 937 (1994).

Second, the statute lists two examples of "specific activities" that constitute "incidental vessel services" which qualify for the B&O tax: [1] "plugging and unplugging refrigerator service to containers, trailers, and other refrigerated cargo receptacles," and [2] "securing ship hatch covers." RCW 82.04.260(7). What do plugging and unplugging refrigerator service and securing ship hatch covers have in common with loading fuel into a ship? After completing a journey the refrigerator service on ship carrying refrigerated cargo must be unplugged; prior to commencing one that service must be plugged in. When the ship arrives to unload its cargo the ship must have its hatch covers unsecured; prior to the ship leaving again the hatch covers must be resecured. And in order to begin its next

[9] The historical record reflects intense concern about maintaining the competitiveness of Washington ports. *See, e.g.*, P. Burke, A History of the Port of Seattle at 131-32 (Seattle 1976) (summarizing the competitive challenges facing the Port of Seattle, e.g., the growth of container vessel transport).

journey in waterborne interstate or foreign commerce, the ship has to have fuel to power its engines (and, if a refrigerated vessel carrying refrigerated cargo, to power the refrigeration units). In short, these are *all* activities evidently "pertinent" to getting the ship ready to move goods and commodities in waterborne interstate or foreign commerce.

The key statutory term is "incidental." As this term also is not defined in the statute, this Court looks to the dictionary to determine the common or ordinary meaning of the word. *Garrison*, 87 Wn.2d at 196. "Incidental" means "**1** a) happening as a result of or in connection with something more important; . . . b) likely to happen as a result or concomitant . . . **2** secondary or minor, but usually associated." WEBSTER'S NEW WORLD DICTIONARY (3rd coll. ed. 1994) 682. The bunkering services here plainly qualify as an "incidental vessel service" under these definitions. The loading of a ship with fuel by Olympic happens "as a result of or in connection with" the loading of the ship with goods and commodities. Getting the fuel into the ship is also "associated" with the primary activity of loading the ship with its cargo (without the fuel, the cargo is not going anywhere). Thus, the plain meaning of the word "incidental" supports Olympic's entitlement to the "stevedoring and associated activities" B&O tax classification on its bunkering services.

Third, the two "specific activities" listed as examples of "incidental vessel services" in RCW 82.04.260(7) are preceded by the introductory phrase "including but not limited to," meaning the list of incidental vessel services is not inclusive and there are other vessel

services that might qualify under this last clause of the statute. In other words, the language "including but not limited to" in the statute expresses the Legislature's intent and recognition that there are "incidental vessel services" covered under RCW 82.04.260(7) that are not listed in the statute but nevertheless qualify as eligible services under this statute.

The Department never explains why the Legislature added the "incidental vessel services" language to RCW 82.04.260(7) if its intention was to grant the lower tax rate to only those persons who actually handle the cargo. The Department makes this latter point very clear where it argues that the only businesses that qualify for the "stevedoring and associated activities" tax are those that move goods over, onto or under a wharf, pier or dock. *See* Dep't Brief at 16. This narrow reading of the statute does not comport with the statute's plain language because the statute clearly and unambiguously allows revenues from "incidental vessel services" to qualify for the B&O tax, too. The Department even goes so far as to state that the two examples of "incidental vessel services" set forth in the statute "are irrelevant." *Id.* But as a practical matter, the Department's proposed reading of the statute renders those examples meaningless -- once again violating the prohibition against rendering statutory terms meaningless.

C. *Ejusdem Generis* Does Not Support The Department's Position; In Fact, *Ejusdem Generis* Should Not Apply At All Because of the "Including But Not Limited to" Language In RCW 82.04.260(7). But, If *Ejusdem Generis* Does Apply, It Supports Olympic's Position, Not the Department's.

The Department also alleges that "Olympic's attempt to read the general term 'incidental vessel services' more broadly than the rest of RCW 82.04.260(7) ... violates the doctrine of *ejusdem generis.*" Dep't Brief at 19. *Ejusdem generis* requires that "general terms, when used in conjunction with specific terms in a statute, should be deemed only to incorporate those things similar in nature or 'comparable to' the specific terms." *Simpson Investment Co. v. Dep't of Revenue*, 141 Wn.2d 139, 151, 3 P.3d 741 (2000). A close analysis of the statutory language at issue demonstrates that the application of *ejusdem generis* either does not apply or supports Olympic, not the Department.[10]

A unique aspect of the last clause of RCW 82.04.260(7)—and one the Department does not address in any detail—is that the Legislature elected to precede the specific examples ("plugging and unplugging refrigerator service containers ..." and "securing ship hatch covers") with the phrase "including but not limited to." Courts are split on whether the language "including but not limited to" precludes or limits application of *ejusdem generis. See, e.g., United States v. Migi*, 329 F.3d 1085, 1089

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[10] The Department's *ejusdem generis* argument relates to the last clause of RCW 82.04.260(7). Again, that clause reads:

> . . . terminal stevedoring and incidental vessel services, including but not limited to plugging and unplugging refrigerator service to containers, trailers, and other refrigerated cargo receptacles, and securing ship hatch covers.

(9th Cir. 2003) ("In addition, we need not apply *ejusdem generis* because Congress modified its list of examples with the phrase 'including, but not limited to.' That phrase 'mitigates the sometimes unfortunate results of rigid application of the *ejusdem generis* rule' " (internal brackets, citations and footnotes omitted)); *Ramirez, Leal & Co. v. City Demonstration Agency*, 549 F.2d 97, 104 (9th Cir. Cal.1976) (same holding); *United States v. West*, 671 F.3d 1195, 1203 (10th Cir. 2012) (*ejusdem generis* does not apply because the statute contains the phrase "including but not limited to"); and *Harlick v. Blue Shield of Cal.*, 686 F.3d 699, 712-713 (9th Cir. 2012) ("The words 'including, but not limited to' in the regulation suggest that the list of benefits . . . are illustrative rather than exhaustive").[11]

If the Court finds that *ejusdem generis* does not apply to the last clause in RCW 82.04.260(7) on account of the phrase "including but not limited to" as the leading cases suggest, Olympic should prevail because the list of specific items following "including but not limited to" is illustrative rather than exhaustive. On the other hand, if the Court finds that application of *ejusdem generis* is proper despite the "including but not

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[11] *But see*, *Schmidt v. Mt. Angel Abbey*, 347 Or. 389, 223 P.3d 399 (2009) (applying the doctrine *ejusdem generis* to a list preceded by "including, but not limited to"); *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1200, 364 U.S. App. D.C. 454 (D.C. Cir. 2005) ("The words 'including, but not limited to' introduce a non-exhaustive list that sets out specific examples of a general principle. . . . Applying the canons of *noscitur a sociis* and *ejusdem generis*, we will expand on the remedies explicitly included in the statute only with remedies similar in nature to those enumerated" (internal citations omitted)); and *Bd. of Chosen Freeholders v. State*, 159 N.J. 565, 732 A.2d 1053 (N.J. 1999) (same).

limited to" language in the statute, Olympic still should prevail under the two-step process for analyzing whether specifically enumerated items fall within the intended meaning of a general term in a statute.

First, courts must examine the "basic characteristics" of the enumerated items. *Schmidt*, 347 Or. at 405 (quoting *Lewis v. CIGNA Ins. Co.*, 339 Or. 342, 350, 121 P.3d 1128 (2005)). "[I]n examining the 'basic characteristics' of the activities, [the court does] not look at each activity *individually,* glean a basic characteristic from that activity, and then determine whether the activity at issue in this case [i.e. fueling] shares that basic characteristic." *Schmidt, supra* (emphasis in original). Instead, the court should seek "to find, if it can, a *common* characteristic among the listed examples." *Id.* (emphasis in original).

Second, courts must "then determine whether the [activity] at issue, even though not one of the listed examples, contains that characteristic and, thus, falls within the intended meaning of the general term." *Id.* (citing *Liberty v. State Dept. of Transportation*, 342 Or. 11, 20-21, 148 P.3d 909 (2006)).

Thus, the proper approach is to find a *common characteristic* among the examples. The Department makes no attempt to explain or examine the common or basic characteristics of the two examples in the last clause of RCW 82.04.260(7) following the "including but not limited to" language. The common characteristic between "plugging and unplugging refrigerator service to containers, trailers and other refrigerated cargo receptacles" and "securing ship hatch covers" is that

these activities prepare the vessel for the next voyage. Likewise, fueling – although not specifically mentioned – prepares the vessel for the next voyage and, therefore, falls within the intended meaning of the general term "incidental vessel services" as an additional "included but not limited to" service.

In summary, if this Court follows the *U.S. v. Migi* line of cases, the Department's attempt to apply *ejusdem generis* to the last clause should be rejected. But, if the Court follows *Schmidt* and applies the two-part test for analyzing the statutory language in light of the "including but not limited to" introductory phrase preceding the two statutory examples, Olympic's bunkering services share characteristics with the two specific examples and, thus, fall within the "included but not limited to" language of the last clause of RCW 82.04.260(7).

D. The Department's "Absurd Result" Argument Is Meritless

The Department concludes by pointing to the alleged "final flaw in Olympic's argument" which is the "absurd result" to which that argument "would lead." Dep't Brief at 25. The "deeply flawed" logic identified by the Department would supposedly allow "countless activities" to qualify for taxation under RCW 82.04.260(7). *Id.* at 26. The Department asserts that, if Olympic's position is accepted, "every activity remotely related to the shipping industry [will] be covered by the stevedoring classification of the B&O tax." Dep't Brief at 10. The Department even provides a list of additional "services" that supposedly will qualify for the stevedoring and associated activities B&O tax if the Court sustains Olympic's appeal:

- the refining process that prepares the oil that Olympic delivers;
- all other tugboat operations involving cargo shipping, including tugs that escort and guide ships into and out of ports;
- preparing and delivering food for crews to eat, since ships require crews to move and crews require food;
- manufacturing and delivering the cargo that the ships transport, since without cargo the vessels could not ship anything at all;
- manufacturing and maintaining the ships themselves *(e.g.,* garbage removal, painting the ship, servicing the engines, repairing or upgrading bridge radio and navigational equipment, etc.), since there could be no cargo shipping without ships and functioning equipment; and
- creating and maintaining a means for the ships to travel from piers and docks to the ocean, *i.e.,* dredging Puget Sound.

Dept. Brief at 26-27.

The Department's claim that the taxation sky will fall if the Court rules for Olympic is meritless, as the Department's own list proves. Many of the items on the Department's list are not even services, let alone "vessel services" that might be eligible for the special B&O tax as contemplated by RCW 82.04.260(7). For example, the Department says that the "refining process that prepares the oil that Olympic delivers" would be subject to this special B&O tax. Refining is a *manufacturing,* not a service, activity. A refinery pays "manufacturing," "wholesale" or "retailing" B&O tax on the "refining process." *See* RCW 82.04.240, 82.04.260, 82.04.270, 82.04.440. Manufacturing is so far removed from a "stevedoring and associated activity" that it should be of concern to this Court that the Department, with its oft-claimed expertise in state tax law,

would even make such a suggestion. The same can be said about manufacturing the cargo, and manufacturing the ship. As for painting a ship or upgrading its navigational system, these are activities that would take place at a shipyard while the vessel is in drydock, not at a wharf or dock while it is being loaded or unloaded with cargo. In sum, contrary to the Department's claim, ruling for Olympic will not "expand ... the law to include innumerable activities[.]" Dept. Brief at 27. Ruling for Olympic will only mean that the statute will be applied as the Legislature intended it should be applied.[12]

III. CONCLUSION

The trial court should be reversed and the case remanded for a determination of the amount of refund owed to Olympic.

RESPECTFULLY SUBMITTED this 18th day of December, 2014.

CARNEY BADLEY SPELLMAN, P.S.

By _____
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Attorneys for Appellant Olympic Tug & Barge, Inc.

[12] The Department's list of hypothetical horribles does include some activities (tugboat escort services, delivery of food to the ship for the crew to eat while on the high seas) that could *arguably* qualify for the "stevedoring and associated activities" B&O tax classification. But these activities are not before the Court today and it would be inappropriate and premature to decide whether they qualify for this tax without a proper record having been made in the trial court by a taxpayer with standing to make such record. And if those activities did end up qualifying for the benefit of the stevedoring and associated activities B&O tax classification, because such a result is consistent with legislative intent, such an outcome should be a cause for satisfaction because the rule of law will have been vindicated.

APPENDIX

RCW 82.04.260(7) (With the Four Sentences Numbered and Broken Out for Ease of Reading)

1. Upon every person engaging within this state in the business of stevedoring and associated activities pertinent to the movement of goods and commodities in waterborne interstate or foreign commerce; as to such persons the amount of tax with respect to such business is equal to the gross proceeds derived from such activities multiplied by the rate of 0.275 percent.

2. Persons subject to taxation under this subsection are exempt from payment of taxes imposed by chapter 82.16 RCW for that portion of their business subject to taxation under this subsection.

3. Stevedoring and associated activities pertinent to the conduct of goods and commodities in waterborne interstate or foreign commerce are defined as all activities of a labor, service or transportation nature whereby cargo may be loaded or unloaded to or from vessels or barges, passing over, onto or under a wharf, pier, or similar structure; cargo may be moved to a warehouse or similar holding or storage yard or area to await further movement in import or export or may move to a consolidation freight station and be stuffed, unstuffed, containerized, separated or otherwise segregated or aggregated for delivery or loaded on any mode of transportation for delivery to its consignee.

4. Specific activities included in this definition are: Wharfage, handling, loading, unloading, moving of cargo to a convenient place of delivery to the consignee or a convenient place for further movement to export mode; documentation services in connection with the receipt, delivery, checking, care, custody and control of cargo required in the transfer of cargo; imported automobile handling prior to delivery to consignee; terminal stevedoring and incidental vessel services, including but not limited to plugging and unplugging refrigerator service to containers, trailers, and other refrigerated cargo receptacles, and securing ship hatch covers.

NOTE: The statute itself does not number each of the four sentences.

NO. 46102-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

Olympic Tug & Barge, Inc., Appellant, vs. State of Washington Department of Revenue, Respondent.	DECLARATION OF SERVICE

I certify that on the date set forth below I served a copy of the following: *Appellant's Reply Brief* and this *Declaration of Service* upon the following attorneys of record:

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☐ U.S. Mail, postage prepaid
☒ E-Mail (pursuant to the parties' Electronic Service Agreement dated September 9, 2013)
☐ Legal Messenger
☐ Other_____

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of December, 2014, at Seattle, Washington.

Caroline Mundy, Legal Assistant

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December 19, 2014 - 2:34 PM

Transmittal Letter

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Appellant Olympic Tug & Barge, Inc.'s Reply Brief with Appendix and Declaration of Service

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